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IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-1074.

IDA H. WILLEY, *et al.*,

Petitioners,

vs.

JAMES F. GARNSEY, *et al.*, TRUSTEES OF THE VILLAGE OF ILION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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Table of Contents.

	Page
I. Jurisdiction	1
II. Statement of the Case	3
ARGUMENT:	
A. The federal question asserted by petitioners is not presented by the record	6
B. Assuming that a federal question was presented it was insubstantial	7
C. The state court judgment sought to be reviewed is supported by adequate nonfederal grounds	7
Conclusion	8
APPENDIX A-1. New York Civil Practice Law and Rules, Sec. 5601	9
APPENDIX A-2. New York Civil Practice Law and Rules, Secs. 5513, 5514 and 5602	11
APPENDIX A-3. New York Civil Practice Law and Rules, Article 78	15
APPENDIX A-4. New York Civil Practice Law and Rules, Secs. 3301, 3017(b)	17
APPENDIX A-5. New York Civil Practice Law and Rules, Sec. 103(3)	17
APPENDIX A-6. New York State Constitution, Article 6, Sec. 3b (6)	18

TABLE OF CASES.

	Page
Benz v. New York State Thruway Authority, 369 U. S. 147, 82 S. Ct. 674, 7 L. Ed. 2d 634	7
Corbett v. Scott, 215 App. Div. 763, 243 N. Y. 66	2
Erie Railroad Co. v. Kirkendall, 266 U. S. 185, 45 S. Ct. 33, 69 L. Ed. 236	6
Fire Dept. v. Wendell, 13 Daly 427	2
George O. Richardson Machinery Co. v. Scott, 276 U. S. 128, 48 S. Ct. 264, 72 L. Ed. 497	8
Gorman v. Washington University, 316 U. S. 98, 62 S. Ct. 962, 86 L. Ed. 1300	1
Harris v. Zion's Savings Bank & T. Co., 313 U. S. 541, 61 S. Ct. 840, 85 L. Ed. 1509	8
Honeyman v. Hanan, 302 U. S. 375, 58 S. Ct. 273, 82 L. Ed. 312	7
James Howden & Co. v. American Condenser Corp., 195 App. Div. 882, affd. 231 N. Y. 627	2
Johnson v. Thornburgh, 276 U. S. 601, 48 S. Ct. 322, 72 L. Ed. 725	8
McClanahan v. Moraver & Hartzell, 404 U. S. 16, 92 S. Ct. 170, 30 L. Ed. 2d 136	7
Mellon v. McKinley, 275 U. S. 492, 48 S. Ct. 34, 72 L. Ed. 390	6
Newsome v. Smyth, 365 U. S. 604, 81 S. Ct. 774, 5 L. Ed. 2d 803	6

Page

Palmieri v. State of Florida, 393 U. S. 218, 89 S. Ct. 440, 21 L. Ed. 2d 389 7

Rockland Power Co. v. New York, 289 N. Y. 45 4

Southern Electric Co. v. Stoddard, 269 U. S. 186, 46 S. Ct. 71, 70 L. Ed. 227 3

Sutter v. Midland Valley R. Co., 280 U. S. 521, 50 S. Ct. 65, 74 L. Ed. 590 6

Utilities Insurance Co. v. Potter, 312 U. S. 662, 61 S. Ct. 804, 85 L. Ed. 1109 8

TABLE OF STATUTES.

New York Civil Practice Law & Rules:

§5601 2

§§ 5513, 5514, 5602 2

Art. 78, §§ 3001, 3017(b) 3, 4

§103(c) 4

New York State Constitution, Art. 6, §3b (6) 2

Judicial Code (28 U.S.C. §1257[3]) 7

Supreme Court Rules—Rule 19 7

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IDA H. WILLEY, *et al.*,

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK.

BRIEF FOR RESPONDENTS IN OPPOSITION.

I.

Jurisdiction.

The statute (28 U.S.C. §1257) provides that "final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed (by certiorari) by the Supreme Court" under specified circumstances.

It has been held, however, that a party seeking a writ of certiorari must show that he has taken all available steps to secure review by the highest court of the State (*Gorman v. Washington University*, 316 U. S. 98, 62 S. Ct. 962, 86 L. Ed. 1300). This petitioners have failed to do.

The petitioners did appeal to the New York Court of Appeals as a matter of right (New York Civil Practice Law and Rules, §5601) from the order of the Appellate Division. Thereafter, the Court of Appeals did dismiss the appeal so taken (petition, p. 21).

There is, however, an alternate method of invoking the jurisdiction of the New York Court of Appeals which petitioners failed to pursue. They could have moved in the Court of Appeals within thirty days after the order of dismissal was made for permission to appeal (New York Civil Practice Law and Rules, §§5513, 5514 and 5602). Such permission shall be granted on questions of law when required in the interest of substantial justice (New York State Constitution, Art. 6, Sec. 3b [6]).

In implementing this constitutional mandate, it has been held that leave to appeal should be granted where the determination of the case involves important questions of statutory construction (*James Howden & Co. v. American Condenser Corp.*, 195 App. Div. 882, affd. 231 N. Y. 627); or where the question is novel and of first impression (*Corbett v. Scott*, 243 N. Y. 66); or where the questions of law are of public importance (*Corbett v. Scott*, 215 App. Div. 763, affd. 243 N. Y. 66); or affect large public interests (*Fire Dept. v. Wendell*, 13 Daly 427).

If petitioners had sought permission from the New York Court of Appeals for permission to appeal in the interest of substantial justice and had demonstrated to that court as they now contend (petition, pp. 4 to 7) that this case presents novel questions of law that should be reviewed, it well may be that permission to appeal would have been granted.

This court passed on substantially the identical issue in *Southern Electric Co. v. Stoddard*, 269 U. S. 186, 46 S. Ct. 71, 70 L. Ed. 227. There application was made to the New York State Appellate Division—the intermediate appellate court—to certify that a question of law was involved which ought to be reviewed by the New York Court of Appeals. When this motion was denied petitioner neither made an application to the Court of Appeals for permission to appeal nor appealed as a matter of right. A motion to dismiss the writ of error was granted.

It is submitted that petitioners having failed to establish that they have exhausted all possibilities afforded by New York State procedures for review of the judgment, the application should be denied.

II.

Statement of the Case.

This counterstatement of the case is made as a basis for the contentions to be hereinafter presented that certiorari should not be granted because (a) any federal questions asserted by petitioners are either insubstantial, or (b) not actually presented by the record, or (c) if it might be found that the lower court's decision may have been based partly on a substantial federal question, the decision also rested on an adequate independent non-federal ground.

Petitioners commenced a proceeding in Supreme Court, Herkimer County, in part as one under Article 78 of New York Civil Practice Law and Rules in the nature of certiorari against a public officer or body but requested judgment declaring the rights of the parties which

is statutorily in the nature of a plenary action (New York Civil Practice Law and Rules, §§ 3001, 3017 [b]).

The trial court noted the defect in the proceeding but pursuant to New York Civil Practice Law and Rules, Section 103 (c), treated the case as one for declaratory judgment (petition, pp. 9-10) and the Appellate Division approved the action (petition, pp. 18-19).

The petition in the lower court contained numerous factual allegations upon which it was asserted that the actions of the Village Board were "tainted with illegality" (petition, herein, pp. 22, 23). All of these, with single exception, were nonfederal grounds. In the last paragraph it was asserted that "such practices * * * constitute a violation of the due process and equal protection clauses of the State and Federal Constitution" (petition, herein, p. 23).

Respondents in the basic proceeding filed an answer wherein the material factual allegations of the petition were denied.

In this posture of the case petitioners should have sought a preliminary trial, either before the court or a jury of these disputed questions of fact. Thus, in *Rockland Power Co. v. New York*, 289 N. Y. 45, the court wrote (p. 50): "A declaratory judgment is *ex vi termini* a judgment on the merits. Until disputed 'questions of fact necessary to be determined before judgment can be rendered' are settled, it is plain that rights and legal relations cannot be determined, defined and declared."

Petitioners having failed to ask for such a trial, the lower court properly held that petitioners had failed to show that the actions of the Village Board were tainted with illegality (petition, p. 10).

In the petition herein it is asserted (p. 23) that "No factual hearing was had on these allegations. The claim was dismissed as insufficient in law." We submit that this is incorrect. The decision of the lower court shows that the facts as set forth in the moving papers and answering affidavits were considered. There was no trial thereof because of petitioners' failure to demand it.

In the remainder of its decision the lower court discussed at some length the various contentions of petitioners that the zoning change was illegal (petition, pp. 11 to 16). A reading thereof establishes that all of these were nonfederal grounds. There is not even an intimation therein that any federal question, constitutional or otherwise, was raised or presented.

The same may be said of the opinion of the Appellate Division (petition, pp. 17 to 20) which concurred in the conclusions of the trial court but went on to decide "certain issues raised below and on appeal (that) were not determined below" (petition, p. 19). Again, all of these additional contentions presented nonfederal questions.

Petitioners now assert that the substantial constitutional question presented is that "of due process and equal protection raised by a Village Board the majority of whom are economically benefited by the passage of an ordinance of zone change which devalues plaintiffs' homes" (petition, p. 2).

ARGUMENT.

A.

The federal question asserted by petitioners is not presented by the record.

Newsome v. Smyth, 365 U. S. 604, 81 S. Ct. 774, 5 L. Ed. 2d 803;
Sutter v. Midland Valley R. Co., 280 U. S. 521, 50 S. Ct. 65, 74 L. Ed. 590;
Mellon v. McKinley, 275 U. S. 492, 48 S. Ct. 34, 72 L. Ed. 390;
Erie Railroad Co. v. Kirkendall, 266 U. S. 185, 45 S. Ct. 33, 69 L. Ed. 236.

These decisions hold that the grounds presented in a petition for certiorari must have a solid basis in the record. The federal question now presented by petitioners is an afterthought. It was not presented to the trial court or intermediate appellate court. It was first injected into the litigation when petitioners tried in vain to prevent a dismissal by the New York Court of Appeals of their appeal taken as of right on alleged constitutional grounds, none of which had been presented to trial or intermediate appellate court except by a catch-all sentence in the petition that was not subsequently pursued.

B.

Assuming that a federal question was presented it was insubstantial.

Under the provisions of both Section 1257 (3) of the Judicial Code (28 U.S.C. §1257 [3]) and Rule 19 of the Supreme Court Rules, the authority of this court to review a state court judgment on certiorari depends on the existence of a substantial federal question. Moreover, Rule 19 indicates that regardless of whether the court below is a state court or a federal court there must be "special and important reasons" for granting a writ of certiorari.

These principles have been implemented not only in denying applications for writs but in dismissing writs as improvidently granted.

McClanahan v. Moraver & Hartzell, 404 U. S. 16, 92 S. Ct. 170, 30 L. Ed. 2d 136;
Palmieri v. State of Florida, 393 U. S. 218, 89 S. Ct. 440, 21 L. Ed. 2d 389;
Benz v. New York State Thruway Authority, 369 U. S. 147, 82 S. Ct. 674, 7 L. Ed. 2d 634;
Honeyman v. Hanan, 302 U. S. 375, 58 S. Ct. 273, 82 L. Ed. 312.

C.

The state court judgment sought to be reviewed is supported by adequate nonfederal grounds.

This court has repeatedly held that, even if a writ of certiorari has been granted to review a state court judgment which rests in part on the decision of a substantial federal question, the court, upon determining that the

state court judgment is also supported by an adequate independent nonfederal ground, will dismiss the writ of certiorari as improvidently granted.

Harris v. Zion's Savings Bank & T. Co., 313 U. S. 541, 61 S. Ct. 840, 85 L. Ed. 1509;
Utilities Insurance Co. v. Potter, 312 U. S. 662, 61 S. Ct. 804, 85 L. Ed. 1109;
Johnson v. Thornburgh, 276 U. S. 601, 48 S. Ct. 322, 72 L. Ed. 725;
George O. Richardson Machinery Co. v. Scott, 276 U. S. 128, 48 S. Ct. 264, 72 L. Ed. 497.

CONCLUSION.

For the foregoing reasons, respondents say that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX A-1.

New York Civil Practice Law and Rules.

§ 5601. Appeals to the court of appeals as of right.

(a) *Dissent, reversal or modification.* An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division which finally determines the action, where (i) there is a dissent on a question of law in favor of the party taking such appeal, or (ii) such order directs a reversal of the judgment or order appealed from, or (iii) such order directs a modification thereof in a substantial respect, which is within the power of the court of appeals to review on such appeal, and the party taking the appeal is aggrieved by the modification.

(b) *Constitutional grounds.* An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States: and

2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.

(c) *From order granting new trial or hearing, upon stipulation for judgment absolute.* An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

(d) *Based upon non-final determination of appellate division.* An appeal may be taken to the court of appeals as of right from a final judgment entered in a court of original instance or from a final determination of an administrative agency, or from an order of the appellate division which finally determines an appeal from such a judgment or determination, where the appellate division has made an order on a prior appeal in the action which necessarily affects the judgment or determination and which satisfies the requirements of subdivision (a) or of paragraph one of subdivision (b) except that of finality.

APPENDIX A-2.

New York Civil Practice Law and Rules.

§ 5513. Time to take appeal, cross-appeal or move for permission to appeal.

(a) *Time to take appeal as of right.* An appeal as of right must be taken within thirty days after service upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, his appeal must be taken within thirty days thereof.

(b) *Time to take cross-appeal.* A party upon whom a notice of appeal is served must take an appeal within ten days after such service or within the time limited by subdivision (a), whichever is longer.

(c) *Time to move for permission to appeal.* The time within which a motion for permission to appeal must be made shall be computed from the date of service upon the party seeking permission of a copy of the judgment or order to be appealed from and written notice of its entry, or, where permission has already been denied by order of the court whose determination is sought to be reviewed, of a copy of such order and written notice of its entry, except that when such party has served a copy of such judgment or order and written notice of its entry, the time shall be computed from the date of such service. A motion for permission to appeal must be made within thirty days.

§ 5514. Extension of time to take appeal or to move for permission to appeal.

(a) *Alternate method of appeal.* If an appeal is taken or a motion for permission to appeal is made and such appeal is dismissed or motion is denied and, except for time limitations in section 5513, some other method of taking an appeal or of seeking permission to appeal is available, the time limited for such other method shall be computed from the dismissal or denial unless the court to which the appeal is sought to be taken orders otherwise.

(b) *Disability of attorney.* If the attorney for an aggrieved party dies, is removed or suspended, or becomes physically or mentally incapacitated or otherwise disabled before the expiration of the time limited for taking an appeal or moving for permission to appeal without having done so, such appeal may be taken or such motion for permission to appeal may be served within sixty days from the date of death, removal or suspension, or commencement of such incapacity or disability.

(c) *Other extensions of time; substitutions or omissions.* No extension of time shall be granted for taking an appeal or for moving for permission to appeal except as provided in this section, section 1022, or section 5520.

§ 5602. Appeals to the court of appeals by permission.

(a) *Permission of appellate division or court of appeals.* An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application:

1. in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency,

(i) from an order of the appellate division which finally determines the action and which is not appealable as of right, or

(ii) from a final judgment of such court or final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601: and

2. in a proceeding instituted by or against one or more public officers or a board, commission or other body of public officers or a court or tribunal, from an order of the appellate division which does not finally determine such proceeding, except that the appellate division shall not grant permission to appeal from an order granting or affirming the granting of a new trial or hearing.

(b) *Permission of appellate division.* An appeal may be taken to the court of appeals by permission of the appellate division:

1. from an order of the appellate division which does not finally determine an action, except an order described in paragraph two of subdivision (a) or subparagraph (iii) of paragraph two of subdivision (b) of this section or in subdivision (c) of section 5601:

2. in an action originating in a court other than the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency,

(i) from an order of the appellate division which finally determines the action and which is not appealable as of right pursuant to paragraph one of subdivision (b) of section 5601, or

(ii) from a final judgment of such court or a final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601, or

(iii) from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

APPENDIX A-3.

New York Civil Practice Law and Rules.

ARTICLE 78—PROCEEDING AGAINST BODY OR OFFICER.

§ 7801. Nature of proceeding.

Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article. Wherever in any statute reference is made to a writ or order of certiorari, mandamus or prohibition, such reference shall, so far as applicable, be deemed to refer to the proceeding authorized by this article. Except where otherwise provided by law, a proceeding under this article shall not be used to challenge a determination:

1. which is not final or can be adequately reviewed by appeal to a court or to some other body or officer or where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's application unless the determination to be reviewed was made upon a rehearing, or a rehearing has been denied, or the time within which the petitioner can procure a rehearing has elapsed; or

2. which was made in a civil action or criminal matter unless it is an order summarily punishing a contempt committed in the presence of the court.

[Sec. 7802. Parties. Omitted as not pertinent.]

§ 7803. Questions raised.

The only questions that may be raised in a proceeding under this article are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or

2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or

3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or

4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

[Sec. 7804. Procedure. Omitted as not pertinent.]

[Sec. 7804. Stay. Omitted as not pertinent.]

§ 7806. Judgment.

The judgment may grant the petitioner the relief to which he is entitled, or may dismiss the proceeding either on the merits or with leave to renew. If the proceeding was brought to review a determination, the judgment may annul or confirm the determination in whole or in part, or modify it, and may direct or prohibit specified action by the respondent. Any restitution or damages granted to the petitioner must be incidental to the primary relief sought by the petitioner, and must be such as he might otherwise recover on the same set of facts in a separate action or proceeding suable in the supreme court against the same body or officer in its or his official capacity.

APPENDIX A-4.

New York Civil Practice Law and Rules.

§ 3001. Declaratory judgment.

The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds.

§ 3017. Demand for relief.

* * *

(b) *Declaratory judgment.* In an action for a declaratory judgment, the demand for relief in the complaint shall specify the rights and other legal relations on which a declaration is requested and state whether further or consequential relief is or could be claimed and the nature and extent of any such relief which is claimed.

APPENDIX A-5.

New York Civil Practice Law and Rules.

§ 103. Form of civil judicial proceedings.

* * *

(c) *Improper form.* If a court has obtained jurisdiction over the parties, a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form, but the court shall make whatever order is required for its proper prosecution.

APPENDIX A-6.

New York State Constitution.

ARTICLE VI.

* * *

§ 3. [*Jurisdiction of court of appeals.*]

a. The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered; but the right to appeal shall not depend upon the amount involved.

b. Appeals to the court of appeals may be taken in the classes of cases hereafter enumerated in this section:

In criminal cases, directly from a court of original jurisdiction where the judgment is of death, and in other criminal cases from an appellate division or otherwise as the legislature may from time to time provide.

In civil cases and proceedings as follows:

* * *

(6) From a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding but which

is not appealable under paragraph (1) of this subdivision where the appellate division or the court of appeals shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals. Such an appeal may be allowed upon application (a) to the appellate division, and in case of refusal, to the court of appeals, or (b) directly to the court of appeals. Such an appeal shall be allowed when required in the interest of substantial justice.